Supreme Court, U.S.
FILED

No. 09- 09-853 DEC 22 2009

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IN THE
Supreme Court of the United States

ARIEL FRIEDLANDER,

Petitioner,

v.

PORT JEWISH CENTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Assuming the First Amendment creates a "ministerial exception" to the jurisdiction of the courts that forecloses a minister's access to the legal system for disputes with the minister's employer, what is the appropriate scope of that exception, particularly when the minister and her employer have chosen to enter into a written employment agreement and the dispute is merely contractual. The courts of appeal have been unable to agree on the appropriate standard for application of the ministerial exception despite nearly 40 years of considering this issue. Furthermore, the Supreme Court has not yet had occasion to set forth a clear standard. The resulting body of case law is conflicting, disjointed and confusing.

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PRELIMINARY STATEMENT

Petitioner, Ariel Friedlander ("Friedlander" or "Petitioner"), appeals the Decision of the Second Circuit affirming the final Decision, Order and Judgment of the United States District Court for the Eastern District of New York, United States District Judge Arthur D. Spatt, dismissing all claims set forth in Friedlander's Complaint against Respondent, Port Jewish Center ("Respondent"), for lack of subject matter jurisdiction.

OPINIONS BELOW

The September 30, 2000, Decision of the United States Court of Appeals for the Second Circuit, is reproduced at App. A, 1a.

The December 8, 2008 Decision of the United States District Court for the Eastern District of New York, is reproduced at App. B, 4a.

JURISDICTIONAL STATEMENT

The District Court declined to exercise subject matter jurisdiction over Friedlander's claims of breach of contract and breach of the covenant of good faith and fair dealing pursuant to the "ministerial exception," which was inappropriately applied in this instance. Subject matter jurisdiction existed there pursuant to 28 U.S.C. § 1332.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1254(1). The Second Circuit's opinion was filed on September 30, 2009.

STATEMENT OF THE CASE

The issue presented in this case is whether the Second Circuit erred in affirming the District Court's holding that it lacked subject matter jurisdiction to decide Friedlander's claims when the resolution of such claims would not entail an examination of religious doctrine, but would instead require only a determination as to whether Friedlander's alleged actions rose to the level of "gross misconduct" or "willful neglect of duty," as those terms were used in her written employment agreement with Respondent.

On December 17, 2007, Friedlander filed a timely action against her former employer, Port Jewish Center, alleging that, in terminating her employment, Respondent violated the terms of her written employment contract and the covenant of good faith and fair dealing. Respondent filed its motion to dismiss for lack of subject matter jurisdiction on March 24, 2008.

In a Memorandum of Decision and Order and Judgment dated December 8, 2008, United States District Judge Arthur D. Spatt granted Port Jewish Center's motion to dismiss the action in its entirety and directed the Clerk of Court to close the case. Friedlander filed her Notice of Appeal on January 5, 2008. On September 30, 2009, the Second Circuit affirmed Judge Spatt's dismissal.

STATEMENT OF FACTS

Friedlander entered into a written employment contract (the "Contract") with Port Jewish Center in or about May 2005 to be its Rabbi. The Contract provided for a term of employment of three years, beginning on July 1, 2005. Friedlander was promised an annual base salary of $84,000, plus a cell phone and automobile allowance of up to $1,000. Her base salary and allowance were to be increased each year by three percent.

The Contract further provided that Friedlander was to have "freedom of the pulpit" and that her employment could be terminated only "for gross misconduct or willful neglect of duty."[1]

On or about March 6, 2006, a group of congregants attended a meeting of Respondent's Board of Trustees to air their complaints about Friedlander. One of those congregants told the Board that if Friedlander was not fired, he and others would leave the congregation.

On or about July 5, 2006, the President of Port Jewish Center sent Friedlander a list of grievances. Respondent terminated Friedlander's employment on or about July 9, 2006.

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[1] The contract also permitted termination in the event Friedlander was physically unable to perform her duties, but that is not at issue here.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit first formally announced the "ministerial exception" over 30 years ago.[2] The courts of appeal have struggled to clearly establish the bounds of the rule ever since. "Among the circuits and lower courts, it is vague and imprecise as to how the three-decade old ministerial exception applies and when it is appropriate to utilize the exception."[3] In fact, the courts of appeal cannot even agree on the Constitutional underpinnings for the exception[4] or the threshold question of to whom the exception applies,[5] but instead "have consistently struggled to decide whether or not a particular employee is functionally a minister."[6]

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[2] *See Rweyemamu v. Cote*, 520 F.3d 198, 206 (2nd Cir. 2008) (stating that the Fifth Circuit decision *McClure v. Salvation Army*, 460 F.2d 553, was the first case to address the ministerial exception).

[3] Leslie K. Harrach, *The New Jersey Supreme Court Allows Constitutionally Forbidden Entanglement of the State in a Church/Minister Employment Relationship in Contradiction of the Ministerial Exception*, 5 Rutgers J.L. & Religion 5.

[4] *See* Gregory A. Kalscheurm, S.J., *Civil Procedure and the Establishment Clause*, 17 Wm. & Mary Bill of Rts. J. 43 (While many courts have recognized and applied the ministerial exception, they have adopted a range of positions regarding the constitutional foundations for the doctrine).

[5] *See* Harrach, *supra* ("The state and circuit courts that have considered whether to apply the ministerial exception have employed differed tests to determine which employees constitute a 'minister' under the exception").

[6] *Rweyemamu*, 520 F.3d at 208 (internal quotations omitted).

The interests at stake in this inquiry are of the "highest order."[7] The Supreme Court, however, has not yet had occasion to rule upon the scope of the ministerial exception, or even its validity.[8] Review by the Supreme Court is therefore necessary to resolve the conflict and confusion existing among the decisions of the courts of appeal and to bring clarity to an area of the law that affects two interests of the highest order, employment rights and the freedom of religion.

The Second Circuit's recent holding in *Rweyemamu v. Cote*, and its application in the present case to dismiss Petitioner's claims, represent an extremely broad interpretation of the ministerial exception, which conflicts with the decisions of its sister Circuits. Friedlander's breach of contract claim was dismissed despite the fact that it could be determined upon solely secular grounds, given that Friedlander's contract provided that her employment could be terminated only for "gross misconduct" or "willful neglect of duty." The Second Circuit's decision thus effectively insulates a religious organization's employment-related decisions

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[7] *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 at 460 (D.C. Cir. 1996) ("This case presents a collision between two interests of the highest order."); *see also EEOC v. Roman Catholic Diocese*, 48 F.Supp.2d 505, 507 (E.D.N.C. 1999) ("The Court is confronted with the clash of two deeply held American convictions."); Janet S. Belcove-Smith, *Ministerial Exception and Title VII Claims*, 2 Nev. L.J. 86.

[8] *See Hankins v. New York Annual Conference of the Methodist Church*, 516 F.Supp.2d 225, 228 (E.D.N.Y. 2007); *Combs v. Cent. Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 347 (5th Cir. 1999).

from review by a secular court regardless of whether religious doctrine is implicated.

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING THE SCOPE AND APPLICABILITY OF THE MINISTERIAL EXCEPTION

The Circuits have not agreed upon the scope or applicability of the ministerial exception.[9] While the Ninth Circuit has taken a narrow view of the exception, the Fifth, Sixth and Seventh Circuits have taken similar and substantially more expansive views. The Second Circuit's decision in *Rweyemamu v. Cote* takes a slightly more moderate stance than do the Fifth, Sixth and Seventh Circuits. The balance of the courts of appeal lie somewhere in between.

A. *Definition Of "Minister"*[10]

The courts of appeal have been unable to agree on a definition of "minister" for purposes of the ministerial exception.[11] Some courts look to the primary duties of the individual in question to determine whether the exception applies. Specifically, these courts have looked at "whether (the plaintiff's) primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or

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[9] *See Rweyemamu*, 520 F.3d at 208; Harrach, *supra*.

[10] There is no dispute in the instant case that Petitioner is a "minister' under any existing definition of that term.

[11] *See Rweyemamu*, 520 F.3d at 208.

participation in a religious ritual and worship."[12] The Second Circuit expanded this test, first criticizing it as "too rigid," and then stating that even "a lay employee's relationship to his employer may be so pervasively religious that judicial interference could run afoul of the Constitution."[13] On the other end of the spectrum, the Ninth Circuit refused to apply the ministerial exception when the plaintiff's "duties (didn't) go to the heart of the church's function . . . ."[14]

These definitions of minister represent significant differences as to the breadth of the exception. The Second and Ninth Circuit's definitions are particularly divergent. The Second Circuit's standard encompasses not only all employees primarily engaged in religious duties but also some lay employees, whereas the Ninth Circuit's standard does not even encompass all employees with primarily religious duties.

After nearly 40 years of wrestling with this issue, the courts of appeal have not yet settled on the threshold

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[12] *Catholic Univ. of Am.*, 83 F.3d at 463; *Rayburn v. General Conference of Seventh Day Adventists Conference of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *see also Petruska v. Gannon Univ.*, 462 F.3d 294 (3rd Cir. 2006) (looking to performance of "spiritual functions").

[13] *Rweyemamu*, 520 F.3d at 208; *see also The Ministerial Exception to Title VII*, 121 Harv. L. Rev. 1776, 1787 (criticizing this test because "courts face difficulty in distinguishing religious activities from nonreligious activities").

[14] *EEOC v. Pacific Press Publishing Ass'n.*, 676 F.2d 1272, 1278 (9th Cir. 1982).

inquiry of who qualifies as a minister. It is therefore not surprising that the courts of appeal are also divided regarding the appropriate standard to apply once the exception has been deemed applicable.

B. *Applicable Standard Once Plaintiff Is Determined To Be A Minister*

The standards set forth by the courts of appeal are divergent, often confusing, and in direct conflict with one another on a variety of issues. One major difference among the Circuits is whether or not any inquiry should be performed at all beyond establishing the plaintiff qualified as a "minister" and the decision in question was employment-related. Additional differences exist concerning the appropriateness of considering the remedy sought by the plaintiff, the motivating factors for the decision, and the form of inquiry that would be required to resolve the case.

The Fifth, Sixth and Seventh Circuits have held that a suit should be dismissed once it is established that the plaintiff is a minister suing the religious organization that employs him or her. The Fifth Circuit has ruled that it is "inherently coercive" to look into employment discrimination claims against a religious organization even if the discrimination was "purely nondoctrinal."[15] In *Lewis v. Seventh Day Adventists*, the Sixth Circuit set forth a similar standard, stating, "We conclude the First Amendment bars civil courts from reviewing decisions of religious judicatory bodies relating to the

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[15] *Combs*, 173 F.3d at 350.

employment of clergy."[16] Similarly, the Seventh Circuit held that "the (ministerial) exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decision. The church need not, for example, proffer any religious justification for its decision...."[17] This standard may also be embraced by the Eleventh Circuit, but it is unclear.[18] These decisions, however, are not in accord with those of their sister circuits.

The D.C., First, Fourth, Ninth and Tenth Circuits have established considerably narrower bounds for the ministerial exception. The D.C. Circuit will permit a case to proceed if there is "some form (of permissible) inquiry . . . and some form (of permissible) remedy."[19] The First and Tenth Circuits look to whether or not the dispute "will turn upon the resolution of controversies

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[16] 978 F.2d 940, 942; *see also* Sara Prose, *Constitutional Law – The Ministerial Exception Exists in Michigan as a Valid Defense in Employment Discrimination Suits*, 87 U. Det. Mercy L. Rev. 41, 42 (The Sixth Circuit ruled the ministerial exception applies when two prongs are met: (1) the employer is a religious institution, and (2) the employee is a ministerial employee).

[17] *Alicia-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003).

[18] *See Gelligton v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1304 (11th Cir. 2000) ("Investigation by a government entity into a church's employment of its clergy would *almost always* entail excessive government entanglement . . .").

[19] *Minker v. Baltimore Annual Conference*, 894 F.2d 1354, 1360 (D.C. Cir. 1999).

over religious doctrine and practice."[20] The Fourth Circuit has permitted an action to proceed where "it does not involve the church's spiritual functions."[21] The Ninth Circuit has established yet another test, asking whether or not "the character of the defense will require a jury to evaluate the reasonableness of the religious practices followed (by the defendant)."[22]

The Second Circuit has yet to set forth a clear test for the resolution of this issue. Just last year, in *Rweyemamu*, the Court declined to "delineate the boundaries of the ministerial exception."[23] In the present case, however, the Second Circuit affirmed the dismissal of the Petitioner's claim that she was improperly terminated when her written employment contract permitted termination only for "gross misconduct or willful neglect of duty." Many jurisdictions require an element of intent for a finding of gross misconduct.[24]

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[20] *Natal v. Christian and Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir. 1989); *see also Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002) (asking whether or not the dispute is "rooted in religious belief").

[21] *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985).

[22] *Bollard v. California Province of the Soc'y of Jesus*, 196 F.3d 940, 950 (9th Cir. 1999).

[23] 520 F.3d at 209.

[24] *See, e.g., Boudreaux v. Rice Palace, Inc.*, 491 F. Supp.2d 625, 633 (W.D. La. 2007) (citations omitted) ("The term 'gross misconduct' has generally been understood to include misconduct that is 'intentional, wanton, willful, deliberate,

(Cont'd)

Given that Friedlander's intent can be evaluated on purely secular grounds, the Second Circuit's ruling in this case essentially holds that any employment-related action taken by a religious institution is beyond review. Furthermore, the dismissal of Friedlander's claims is in conflict with the Third Circuit's ruling in *Petruska*, in which the Court held that "On its face, application of state contract law does not involve government-imposed limits on [defendant's] right to select its ministers . . ."[25] The decision at issue is also in conflict with the rulings of the D.C. Circuit Court and the New Jersey Supreme Court, which respectively permitted employment-related claims to go forward against religious institutions on theories of breach of an oral contract and breach of implied contract.[26]

(Cont'd)
reckless or in deliberate indifference to an employer's interest.'"); *Dailey v. Bd. of Review*, 214 W. Va. 419, 423, 589 S.E.2d 797 (2003) (defining gross misconduct as "misconduct consisting of willful destruction of his employer's property; assault . . . ; reporting to work [intoxicated]. . . ; reporting to work under the influence of any controlled substance; arson, theft, larceny, fraud or embezzlement in connection with his work. . . ."); *Giles v. District of Columbia Dep't of Employment Services*, 758 A.2d 522, 525 (D.C. 2000) (referring to D.C. Code § 46-111(b)(1), which lists as examples of gross misconduct sabotage, unprovoked assault or threats, arson, theft, dishonesty, insubordination, repeated disregard of reasonable orders, intoxication, use or possession of a controlled substance, willful destruction of property, and repeated absence or tardiness following warning).

[25] 462 F.3d at 310.

[26] *See Minker*, *supra* (permitted claim to proceed based upon an alleged breach of an oral contract to provide the plaintiff
(Cont'd)

C. *Factors To Be Considered When Applying The Standard*

The division among the courts of appeal runs deeper than just the nature of the inquiry. The split extends to the factors that should be considered as well. For instance, the lower courts disagree as to the relevance of the remedy sought by the plaintiff.[27] In *Bollard*, the Ninth Circuit considered it relevant that the plaintiff requested only money damages, but not reinstatement. The court perceived equitable relief as more troublesome because it could result in "continuing court surveillance."[28] The D.C. Circuit agreed, stating in *Minker* that if "the remedy would be limited to the award of money damages, we see no potential for distortion of church appointment decisions."[29] This is in direct contrast to *Kraft*, which expressly held that the form of the remedy sought is irrelevant.[30]

(Cont'd)

with a congregation suited to his training and skills); *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002) (permitted claim to proceed based upon an alleged breach of an implied contract not to force the plaintiff, who was a priesthood candidate being trained in a seminary, to receive his education in a hostile work environment).

[27] Here, Petitioner seeks money damages.

[28] 196 F.3d at 950.

[29] 894 F.2d at 1360.

[30] *See Kraft v. The Rector, Churchwardens and Vestry of Grace Church in New York*, 2004 WL 540327, 5 (S.D.N.Y. 2004) ("Under a free Excerise Clause analysis, Plaintiff's distinction between a claim for damages and a claim for reinstatement is irrelevant").

Courts have also disagreed as to whether the purported reason for termination is relevant. The Ninth Circuit found this to be the central issue for determining the applicability of the ministerial exception.[31] The D.C. Circuit has asked whether the court would be forced to "choose between . . . competing religious views."[32] Each of these decisions is in conflict with the Seventh Circuit's holding in *Alicia-Hernandez*, in which the Court approvingly cited a Fourth Circuit case for the proposition that "the (ministerial) exception precludes any inquiry whatsoever into the reasons behind a church's ministerial employment decisions."[33] Here, as argued before the Second Circuit, the reasons for Petitioner's termination are critical in that the parties' written contract provides limited bases for termination, which can be evaluated on purely secular grounds.

The courts of appeal are divided as to whom the ministerial exception is applicable, what the scope of the exception is when the plaintiff is a "minister," and how to determine whether a particular case falls within that scope. The Supreme Court should thus grant certification in order to resolve these conflicts among the courts of appeal and bring clarity to an area of law that touches upon two of the most fundamental and important legal principles, the freedom of religion and employment rights.

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[31] *See Bollard*, 196 F.3d at 950.

[32] *Catholic Univ. of Am.*, 83 F.3d at 466.

[33] 320 F.3d at 703.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED SEPTEMBER 30, 2009

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 09-0021-CV

ARIEL FRIEDLANDER,

Plaintiff-Appellant,

-v.-

PORT JEWISH CENTER,

Defendant-Appellee.

Present BARRINGTON D. PARKER, and RICHARD C. WESLEY, Circuit Judges, JANE A. RESTANI,* Judge.

SUMMARY ORDER

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the district court judgment is AFFIRMED.

Ariel Friedlander appeals from a judgment of the United States District Court for the Eastern District of New York (Spatt, *J.*). The district court dismissed

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* The Honorable Jane A. Restani, Chief Judge of the United States Court of International Trade, sitting by designation.

Appendix A

Friedlander's claims against Port Jewish Center ("the Temple") arising from the Temple's termination of her as its rabbi. Citing the "ministerial exception," a constitutional doctrine that forbids courts from disturbing the autonomy of religious institutions over ecclesiastical affairs and from entangling themselves in religious questions, *see Rweyemamu v.. Cote*, 520 F.3d 198, 204-09 (2d Cir.2008), the district court determined that it lacked subject matter jurisdiction. Friedlander now contends that dismissal pursuant to the ministerial exception was inappropriate because the district court's analysis of her claims would not have required it to examine religious issues. We assume the parties' familiarity with the facts, procedural history of the case, and issues presented on appeal.

This Court reviews *de novo* a decision to grant a motion to dismiss for lack of subject matter jurisdiction. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir.2000). "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Id.*

In *Rweyemamu*, we held that a plaintiff-minister's race discrimination suit against a diocese was barred by the ministerial exception because reviewing the minister's claim would have required the district court to assess the plausibility of the diocese's contention that it fired the priest due to his inadequate performance of his pastoral duties. *Rweyemamu*, 520 F.3d at 209. We held that such a review "easily falls within" the

boundaries of the ministerial exception. *Id.; see also Minker v. Baltimore Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C.Cir.1990) ("[E]valuation of the 'gifts and graces' of a minister must be left to ecclesiastical institutions.").

Similarly, review of Freidlander's claims in this case would require scrutiny of whether she should have, *inter alia*, read more extensively from the Torah at certain services, prepared students for their Bar or Bat Mitzvah more adequately, performed certain pastoral services that were not performed, or followed the Temple's funeral service policies. A reviewing court would also be required to assess whether any failures rose to the level of "gross misconduct or willful neglect of duty" under the relevant employment contract. We agree with the district court that such review would involve impermissible judicial inquiry into religious matters.

For the foregoing reasons, the decision is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: Franklin Perry

APPENDIX B — MEMORANDUM DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 8, 2008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

07-CV-5253 (ADS)(ETB)

ARIEL FRIEDLANDER,

Plaintiff,

-against-

PORT JEWISH CENTER,

Defendant.

MEMORANDUM OF DECISION AND ORDER

SPATT, District Judge.

On December 17, 2007, Rabbi Ariel Friedlander ("the Plaintiff") commenced this lawsuit against her former employer, the Port Jewish Center ("the Defendant" or "the Temple"), alleging that, in terminating her, the Defendant violated the terms of her contract and the covenant of good faith and fair dealing. The Defendant has moved to dismiss the Plaintiff's complaint under Fed.R.Civ.P. 12(b)(1) on the ground that the First Amendment precludes the Court

from exercising subject matter jurisdiction over the Plaintiff's claims. For the reasons that follow, the Defendant's motion to dismiss is granted.

I. BACKGROUND

The following facts are drawn from the Plaintiff's complaint and the documents that were incorporated by specific reference therein. The Plaintiff entered into a contract with the Defendant in May of 2005 to serve as the Temple's rabbi for a period of three years. The contract provided that the Plaintiff would perform "all the customary and usual duties of rabbis of Reform Congregations of the Union of Reform Judaism." In particular, the contract specified that the Plaintiff was expected to carry out various spiritual and administrative duties that included holiday and worship services; life cycle events; educational functions; pastoral functions; temple and other community functions; membership functions; and administrative functions.

The contract also provided that "the Rabbi shall have freedom of the pulpit," and indicated that the Temple could terminate the Plaintiff's contract only "for gross misconduct or willful neglect of duty." The Plaintiff alleges that some of the Temple's congregants raised objections to changes the Plaintiff made to Bar Mitzvah and Bat Mitzvah services. On or about March 6, 2006, a group of congregants attended a meeting of the Temple's Board of Trustees to air their complaints about the Plaintiff. According to the Plaintiff, one of those congregants, John Helfat, told the Board that if they

did not fire the Plaintiff, he and others would leave the congregation.

On or about July 5, 2006, Sandy Ehrlich, the Temple President, sent the Plaintiff an email cataloguing a list of grievances. This extensive list of grievances included, among other issues, the congregants' dissatisfaction with: (i) the Plaintiff's infrequent readings of the Torah; (ii) the quantity and variety of liturgical music selected for religious services; (iii) changes made to the Bar Mitzvah and Bat Mitzvah services; (iv) the Plaintiff's funeral service policies; (v) the Plaintiff's inability to work with religious instructors and the Cantor; (vi) the Plaintiff's neglect of her pastoral functions; (vii) the Temple's attrition rates under her leadership; and (viii) the number of hours the Plaintiff dedicated to administrative functions. Ehrlich's email indicated that she was sending the Plaintiff the list in order to give the Plaintiff an opportunity to prepare a presentation for a meeting with the Board of Trustees on the following day.

However, the Plaintiff did not attend the July 6th Board of Trustees meeting. On July 9, 2006, the Plaintiff received a letter from the Temple stating that the Board of Trustees had voted unanimously to recommend that her contract be terminated. The Plaintiff avers that, on or about August 2, 2006, the Temple officially terminated her contract. In December of 2007, the Plaintiff commenced this lawsuit alleging that the Defendant's proffered reasons for her firing did not constitute just cause under the contract because she did not commit

"gross misconduct" or "willful neglect". The Defendant moved to dismiss the complaint in or about March of 2008 on the ground that the Religion Clauses of the First Amendment preclude the Court from reviewing the Plaintiff's firing.

The Defendant's reply memorandum in support of the motion to dismiss set off an additional round of motion practice addressing whether the Court could consider "new material" introduced by the Defendant in its reply. Because the Court will not consider or rely upon the "new material" in deciding this motion, it is unnecessary to address the Plaintiff's motion to strike portions of the Defendant's reply.

II. DISCUSSION

A. 12(b)(1) Standard

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir.2000). The standard for reviewing a 12(b)(1) motion to dismiss is essentially identical to the 12(b)(6) standard, except that "[a] plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Makarova*, 201 F.3d at 113. When considering a motion to dismiss for lack of subject matter jurisdiction, the Court may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional

question. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 141 n. 6 (2d Cir.2001).

B. The Defendant's Motion to Dismiss

The Plaintiff argues that the Defendant's proffered reasons for her firing did not constitute just cause under the contract because she did not commit "gross misconduct" or "willful negligence". The Plaintiff also asserts a common law claim that the Defendant's breached the covenant of good faith and fair dealing by "fabricat[ing] and exaggerat[ing] situations they thought would constitute gross misconduct and willful neglect." The Defendant counters that the "ministerial exception" precludes the Court from exercising subject matter jurisdiction over the Plaintiff's claims.

"Since at least the turn of the century, courts have declined to 'interfere [ ] with ecclesiastical hierarchies, church administration, and appointment of clergy.' " *Rweyemamu v. Cote*, 520 F.3d 198, 204-5 (2d Cir.2008) (citing *Minker v. Balt. Annual Conference of the United Methodist Church*, 894 F.2d 1354, 1357 (D.C.Cir.1990)). In recognizing a ministerial exception to the jurisdiction of the federal courts, some courts have invoked the "right to church autonomy secured by the Free Exercise Clause," while "[o]thers have emphasized that taking sides in a religious dispute would lead an Article III court into excessive entanglement in violation of the Establishment Clause." *Rweyemamu*, 520 F.3d at 205 (citations omitted). Although the textual source of the ministerial exception may be unsettled, *Rweyemamu*

confirms "the vitality of [this] doctrine in the Second Circuit." *Id.* at 207.

In *Rweyemamu*, the plaintiff, a Catholic priest, alleged that his for cause termination—predicated upon his poor performance and negative attitude—was merely a pretext for race-based discrimination. *Id.* at 200. The Second Circuit found that the ministerial exception precluded the Court from exercising jurisdiction because of the "pervasively religious" nature of the ordained priest's duties and because an inquiry into his claims would have entangled the Court in Catholic doctrine. *Id.* at 209. In particular, the Court explained that the Plaintiff's discrimination claim required him to show that the church's proffered reasons for his firing were pretextual; an argument that would necessarily require the Court to "assess the quality" of his sermons and determine whether he was "insufficiently devoted to the ministry." *Id.*

As the Plaintiff points out, the ministerial exception plainly does not create for religious institutions a charmed existence free from liability for "their torts and upon their valid contracts." *Id.* (quoting *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir.1985)). However, the Free Exercise Clause does protect a " 'church's right to decide matters of governance and internal organization.' " *Id.* at 208 (citing *Petruska v. Gannon Univ.*, 462 F.3d 294, 307 (3d Cir.2006)). "The more 'pervasively religious' the relationship between an employee and his employer, the more salient the free exercise concern becomes."

Rweyemamu, 520 F.3d at 208. Here, it is undisputed that, as a Rabbi, the Plaintiff exercised a pervasively religious function. The Plaintiff argues instead that this is a purely secular contract case that would not require the Court to entangle itself in religious doctrine. The Court disagrees.

"The Establishment Clause forbids 'excessive government entanglement with religion.' " *Rweyemamu*, 520 F.3d at 208 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). The Second Circuit teaches that certain claims, regardless of their "emblemata," may "inexorably entangle [the courts] in doctrinal disputes." *Id.* at 208 (citing *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1577 (1st Cir.1989)). In this sense, the fact that the Plaintiff asserts causes of action sounding in violations of state contract law does not alter the Court's analysis. *See Kraft v. Rector, Churchwardens & Vestry of Grace Church in New York*, 2004 WL 540327, at *4 (S.D.N.Y. Mar. 17, 2004) (finding that "although the instant suit asserts common law claims, rather than federal statutory claims, the same constitutional principle applies to both, and bars court review of church decisions regarding the employment of ministers.").

Here, adjudicating the Plaintiff's claim would, as in *Rweyemamu*, necessarily require the Court to review the Plaintiff's performance of her rabbinical duties. This is precisely the type of inquiry that the First Amendment prohibits. The Plaintiff's duties included, among other things, selecting readings from the Torah,

and establishing policies for funeral services as well as Bar Mitzvah and Bat Mitzvah services. These are purely religious matters in which the Court may not interfere. *See Rweyemamu*, 520 F.3d at 207 (finding that the Court "will not subject to examination the genuineness of a proffered religious reason for an employment action") (emphasis added).

Nevertheless, the Plaintiff urges the Court to exercise its "powers of equity" to find that the Defendant breached the covenant of good faith and fair dealing. However, this argument misapprehends the nature of the Court's jurisdiction. Having found that the Court lacks subject matter jurisdiction over the Plaintiff's claims, the Court is powerless to grant the Plaintiff any form of relief. Accordingly, the Plaintiff's complaint must be dismissed.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the Defendant's motion to dismiss the Plaintiff's complaint is granted, and it is further

ORDERED, that the Clerk of the Court is directed to close the case.

SO ORDERED.

Appendix B

Dated: Central Islip, New York
December 8, 2008

s/ Arthur D. Spatt
ARTHUR D. SPATT
United States District Judge